

**National Tribal Water Council In-Person Meeting
October 23-24, 2018
Hyatt Regency Aurora-Denver Conference Center
13200 East 14th Place, Aurora, CO 80011**

**Engagement on CWA 404g Rulemaking and Tribal Consultation
DRAFT SESSION SUMMARY**

On October 24, 2018, Kathy Hurd of EPA's Office of Wetlands, Oceans and Watersheds (OWOW) joined the NTWC to provide an overview of the Clean Water Action section 404(g) regulations and EPA's plan for modernization. The session provided an opportunity for EPA to continue a dialog with the NTWC to seek input on how the CWA section 404(g) regulations could be improved to increase interest by tribes in assuming CWA section 404 permitting authority and to provide greater clarity for those pursuing or administering a CWA section 404(g) dredged and fill permitting program. Copies of Kathy's briefing slides were shared with the NTWC members following the meeting (and are attached at the end of this meeting summary).

Summary of Comments/Questions:

- **Question (Phil Cernera):** Phil asked that for states that have assumed the 404 program, whether maps are required to determine who the permitting authority is for which waters.
 - **Response:** Kathy indicated that this can differ by state, noting that New Jersey uses a list of which waters are administered by the state, while Florida, which is considering assuming the program, is considering developing a map that would indicate which entity to go to for permitting. Kathy added that for partial 404 permit programs, if they are implemented under the new rulemaking, the Agency would be looking for input into how best to provide permitting information (e.g., using a map; providing information on the permitting authority for different categories or types of discharges, etc.)
- **Question (Ken Norton):** Ken asked whether the scope of the current regulatory effort includes the ability to provide comment or input regarding tribes' ability to have authority to comment on tribal treaty rights issues on usual and accustomed lands.
 - **Response:** Kathy indicated that, no, that is outside of the scope of this rulemaking and not germane to the portion of the Clean Water Act (CWA) regulations that are under consideration.
- **Comment (Nancy Schuldt):** Nancy commented that Rick Gitar, a colleague working for the Fond du Lac, served on the EPA's Assumable Waters FACA committee. She expressed concern that the state legislature in Wisconsin has directed the state to look at this issue and that it has not been made clear whether the Army Corps of Engineers (ACOE) would retain permitting authority on tribal lands. She noted that, if not, there would be no consultation with tribes on either environmental (i.e., under CWA 401 certification authority) or National Historic Preservation Act (NHPA) concerns.
 - **Response:** Kathy indicated that ACOE would retain authority on tribal reservations. EPA's current regulations clearly state that not taking on authority on tribal lands does not trigger partial assumption because states are not eligible to do so. This is not something EPA intends to change in the rulemaking effort.
- **Comment (Nancy Schuldt):** Nancy expressed concern that the Minnesota state task force did not understand where their authorities lie.

- **Response:** Kathy indicated that EPA would work with the state on this, and that the state understood their lack of authority to administer a 404(g) program on tribal lands. With regard to 401 certification authority and the NHPA, she noted that if an activity may affect a downstream activity, the state/tribe with authority would need to send the permit to those entities potentially affected to seek comment. She added that if the state/tribe cannot resolve the comments/issues identified, then they will have to send the permit to EPA and indicate why they cannot address those concerns/objections; the EPA review process found at 40 CFR 233.50 would be triggered. So, the ability of the downstream state/tribe to comment on a permit would exist and EPA oversight would remain
- **Comment (Nancy Schuldt):** Nancy noted that the Fond du Lac looked into assumption of the 404 program, but does not have the resource available to do so.
- **Comment (Nancy Schuldt):** Nancy commented that, in practice, in Wisconsin, this coordination between the state and tribe is not occurring. The tribe has indicated that tribal WQS are being violated by a potential action, and she has heard that an agreement exists between the state, Region, and federal agencies that the project will move forward even in light of tribal WQS being violated.
 - **Response:** Kathy noted that EPA's role changes if the state were to assume the program. EPA must review permits where there is reasonable potential to adversely affect the waters of a downstream state or tribe; additionally, if a state or tribe could not address the concerns of a downstream tribe or state, the permit with reasons why the concern could not be addressed would be sent for EPA review.
- **Comment (Kathy Brosmer):** Kathy provided some perspectives on the 404 program in Michigan, noting that in 2011, when the state's 404 assumption program was renewed, the tribes in Michigan had to insist on having the language "and tribes" included in the agreement with the state. She noted that, until then, agreement did not include tribes. She added that she has concerns about EPA's intentions versus the reality of past Agency actions, particularly in the state of Michigan, noting concern with respect to EPA leadership's handling of the crisis with respect to Flint's drinking water system.
 - **Response:** Kathy noted that the original MOA language predated EPA's tribal consultation and coordination policy and Executive Order (EO) 13175, and that this was the reason that the language referring to tribes was not originally included in the agreement.
- **Question: (Ann Marie Chischilly, ITEP):** Ann Marie asked who was represented on the Assumable Waters FACA Subcommittee.
 - **Response:** Kathy indicated that there were two tribal representatives, Rick Gitar of Fond du Lac, and James Denominee, on the subcommittee, in addition to representatives from about 10 states, as well as representatives for agriculture, the National Wildlife Federation, and the National Association of Home Builders.
- **Question (Michael Bolt):** Michael asked which states have indicated that they are considering assumption of the 404 program.
 - **Response:** Kathy indicated that EPA has been talking to a number of states about this, including: Minnesota, Indiana, Arizona, Wisconsin, and Florida. She added that the EPA has also heard from New Hampshire, Vermont, and Nebraska, Pennsylvania, Iowa, along with a number of tribes but that they have not actively engaged EPA at this time.
- **Question (Michael Bolt):** Michael asked what the deadline is to provide early input into this action.

- **Response:** Kathy indicated that the deadline for the tribal consultation period is December 21, 2018. She added that the Agency will also provide a public comment period for the proposed rule when it is issued, which is currently anticipated for the fall – winter of 2019 - 2020.
- **Question (Ken Norton):** Ken asked how tribal consultation and early engagement comments will be considered by the Agency for this rulemaking effort.
 - **Response:** Kathy indicated that, over time, she has kept a list of all questions (e.g., issues where additional clarity is needed for the program) pertaining to 404 assumption that have been asked by states and others over time. However, she indicated that she does not anticipate that this list is comprehensive. It also may not reflect what tribes may think are barriers to program assumption and/or what portions of the regulations might need additional clarity. Kathy indicated that having such information, provided by our co-regulators the tribes, before a rule is proposed, makes it much easier to incorporate such issues into the rulemaking at an early stage (i.e., at the proposed rather than final rule stage). She added that information received only at the time of proposal of a rule could potentially factor into the cost assessment for the rule, and changes to the cost assessment could result in delays to the Agency's final rulemaking.
- **Question (Ken Norton):** Ken asked how and whether the FACA recommendations were fully embraced by the Administration at the time.
 - **Response:** Kathy indicated that, in general, when FACA recommendations are made, the Administrator can adopt them immediately or send them to the appropriate national program office to consider. In this case, the recommendations were sent to the Office of Water. The rulemaking effort underway is responding to the recommendations of the FACA as well as other areas of clarity requested over the years and garnered through this tribal consultation process and input from states. Kathy noted that Dave Ross, EPA Office of Water's Assistant Administrator, participated in the FACA and has a personal interest in having those recommendations implemented. Additionally, Kathy noted and that she has been working with four successive Assistant Administrators in the Office of Water on these issues and they all support state and tribal assumption of the program – for different reasons, but they all support assumption.
- **Comment (Eric Morrison):** Eric expressed concern that the current Administration has expressed that they are not in support of tribal issues and/or rights.
 - **Response:** Kathy indicated that the CWA clearly states that tribes can assume the 404 program.
- **Question (Nancy Schuldt):** Nancy asked whether the decision as to whether a state or tribe assumes the program occurs at the Regional level (as opposed to at EPA headquarters).
 - **Response:** Kathy responded that the regulations state that the Regional Administrator approves program assumption requests for states and tribes, with the concurrence of the Assistant Administrators for the following EPA's program offices: Office of Water, Office of Enforcement and Compliance, and Office of General Counsel. The objective of this review and oversight is to ensure that programs are being implemented consistently nationally.
- **Question (Ken Norton):** Ken asked whether tribes that previously expressed interest in assuming the 404 program have reached out to Kathy and/or whether she has reached out to them proactively on this?
 - **Response:** Kathy indicated that she has heard from more tribes recently, since EPA Acting Administrator, Andrew Wheeler, sent letters to all tribal leaders. She anticipates

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that she will hear of additional interest now that the tribal consultation period has opened for this action. With respect to individual tribes, Kathy noted that the Seminole Tribe has reached out to her both because of Florida's interest in assuming the 404 program and because of the tribe's own potential interest in assuming the program. She added that she also actively worked with the Fond du Lac in the past.

- **Question (Phil Cernera):** Phil questioned how 404 assumption would get a tribe any further in its water quality program that having CWA 401 certification authority.
 - **Response/Discussion:** Nancy Schuldt responded that Rick Gitar (Fond du Lac) has indicated that the tribe knows its waters and resources better than anyone else, and that assuming the 404 program could provide the tribe the ability to propose better and/or more significant mitigation. Nancy indicated that the big problem with the Corps 404 permit program is that tribes are not being afforded adequate review and, therefore, not provided compensation adequate for loss/mitigation efforts. She noted that if the tribe were to issue the permit, the tribe would be able to decide what would be appropriate and be able to implement this, rather than just identifying concerns with a proposed permit. Phil indicated that his tribe has been successful in stopping a 404 permit due to its concerns. Kathy noted that 404 assumption and 401 certification authority were different tools available to tribes, and the decision to pursue one tool over another is a decision that each tribe must make, and likely would vary based upon the tribe, the environmental resources the ACOE district, etc.
- **Comment (Eric Morrison):** Eric indicated that he was interested to know what types of information with respect to subsistence rights would be useful to provide.
- **Comment (Michael Bolt):** Michael noted that it does not surprise him that Seminole Tribe of Florida is asking about authority because Florida has history of treating tribes as stakeholders and not as sovereign nations. Michael then asked, if a tribe were to assume the 404 program, would this assist the tribe in being able to have a role/be able to comment on permitting in aboriginal territory. (He clarified that the Eastern Band of Cherokee is not a treaty tribe and, therefore does not have tribal treaty rights, but does have sacred sites of concern consisting of historic sites that are not populated.)
 - **Response:** Kathy responded that this is a question that she would like to take back for consideration **(Action Item)**.
- **Question (Alex Cabillo):** Alex asked whether any information could be shared with respect to Arizona's potential interest in assuming the 404 program.
 - **Response:** Kathy noted that the state did have someone participate on the FACA, however, the state had also expressed interest prior to the formation of the FACA. She added that states often come forward because they may be frustrated by the Army Corps of Engineers permitting delays, or want to streamline permitting processes, or are seeking more certainty for highway projects. She pointed out that in the case of Arizona, the state is struggling with respect to how to deal cultural resources where a tribe may not reside in the state. She encouraged the tribes to engage on this issue with the state. The state is looking for paths forward.
- **Question (Micha Bolt):** Michael asked whether there has been any communication between the EPA and the Intertribal Council of Arizona on this issue.
 - **Response:** Kathy indicated that she could check with her Regional counterpart, Sam Ziegler, on this. **(Action Item)**

- **Comment (Alex Cabillo):** Alex noted that because there are so many tribes in Arizona, the state does recognize sovereignty, but he has concerns about the impacts of bringing in additional people and industry, particularly with respect to impacts on water rights in the area.
 - **Response:** Kathy suggested engaging with state to discuss the process for tribal input and engagement and working with the state to codify this process.

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